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CHARLES ELMORE

Supreme Court of the United States

October Term, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY, *et al.,*
Respondents-Intervening-Underwriters.

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY, et al., RESPONDENTS-INTERVENING UNDERWRITERS.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY, et al., RESPONDENTS-INTERVENING UNDERWRITERS.

Certiorari granted the 8th day of March, 1937, limited by order of this Court to the second question presented by the petition for writ of certiorari (R. 142), to review the order and decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decree of the United States District Court for the Northern District of Ohio, Eastern Division (Judge S. H. West sitting) (R. 123); and to review the order of the Circuit Court of Appeals denying petitioner's motion for rehearing herein (R. 142).

Thus limited, the pertinent portion of the decree brought here for review adjudged that Atlantic Mutual

Insurance Company and other similarly situated underwriters, who intervened following trial of the consolidated cause and finding of mutual fault, issued policies of insurance primarily for the benefit of cargo laden on the "Dixon" at time of collision and, because of mutual fault, were entitled through subrogation, to recover from the owner of each of the colliding vessels a moiety of all payments made on account of loss and damage sustained by the "Dixon's" cargo by reason of the collision, with right of recovery over from either vessel of any balance uncollectible from the other.

The opinions of the District Court (R. 104-107) are not officially reported. The opinion of the Circuit Court of Appeals (R. 123) is reported at 86 F. (2d) 740.

Statement of the Case.

Inception of the Case.

By reason of collision occurring August 11, 1933, in St. Clair River between the Steamer "George D. Dixon," owned by petitioner and the Interstate Steamship Company's Steamer "Willis L. King," each vessel together with cargo laden on the "Dixon" sustained substantial damage.

The action is a consolidated cause brought to establish liability and cross liability between the vessels involved in the collision. The owner of the "King" filed libel against petitioner *in personam* for recovery of the damage sustained by the "King" (R. 2-5).

The petitioner, as owner of the "Dixon," and as carrier and/or bailee of cargo laden thereon, filed libel *in rem* against the "King" and *in personam* against the Interstate Steamship Company, her owner (R. 10-15). The latter pleaded therein against petitioner as owner of the "Dixon" under the 56th Admiralty Rule with respect to cargo damage (R. 20-23). Answer to the impleading petition was filed by petitioner, as owner of the "Dixon"; and also to its own libel (R. 24-28). No answer was, however, filed by petitioner in its representative capacity on behalf of cargo and no claim was made by cargo as against the "Dixon".

Upon the trial, the suits were consolidated and proofs were taken upon the question of fault alone. The District Court wrote an opinion holding both vessels at fault, and directing that the damages be divided accordingly, with the usual order of reference (R. 31-40).

The Contentions Respecting Insurance.

Atlantic Mutual Insurance Company then intervened for its interest as insurer of the cargo of the "Dixon", having insured thirty per cent of the total insurance issued. The intervening petition alleged that the cargo of the "Dixon" was shipped pursuant to contract of carriage between the owners, shippers and consignees of cargo, and the carrier (petitioner here), whereby the carrier agreed to provide insurance upon the cargo against the perils of the seas and lakes, including collision (R. 43); that the intervenor, by a policy of insurance thereafter issued to the carrier "*for the account of whom it may concern*" on cargo carried on the

"Dixon" during the season of 1933, insured the owners, shippers and consignees of cargo laden on the "Dixon" at the time of collision upon said cargo against the perils of the seas and lakes, including collision and also against claims for general average contributions, to the extent of thirty per cent of $1,100,000.00, the remainder of which insurance was provided by other underwriters (R. 43); that the libel theretofore filed by the Transit Corporation, as owner of the "Dixon" and as carrier and/or bailee of her cargo, against the "King" and her owner alleged sole fault upon the part of the "King" in specified particulars (R. 43, 44); that the sum of $6401.57, being thirty per cent of the then ascertained amount of loss and damage to cargo, had been paid to the carrier for the account of owners, shippers and consignees of cargo by reason of damage sustained as a result of the collision, and that the similar percentage of the balance of cargo damage and loss sustained, including general average charges when ascertained, would be likewise paid, whereby petitioner had become and would become subrogated to the rights of cargo (R. 45); that, through such subrogation to the rights of cargo owners and shippers, the intervenor had acquired and possessed a right of recovery against the "King" and her owner on account of the collision for the sums paid and to be paid (R. 45).

It was stipulated by all parties that the intervening petition of Atlantic Mutual Insurance Company stand as the intervening petition of fourteen other similarly situated underwriters who issued the remaining seventy per cent of the insurance under similar policy conditions (R. 46-49).

The petitioner answered the intervening petition (R. 96), reiterating freedom from fault upon the part of the "Dixon". It affirmatively asserted that by reason of the provisions of the tariffs and bills of lading covering the "Dixon's" cargo, the carrier intended to and did assume liability for all cargo loss and damage, including general average charges, resulting from collision or other sea perils, and that the carrier had accordingly become liable to pay all losses sustained by cargo as the result of the collision; that it had paid and would pay claims made on account of cargo loss and damage; that intervening underwriters possessed no rights, except as derived through the carrier, under the policies of insurance which, it was alleged, insured and indemnified the carrier against the liability assumed by it to cargo resulting from collision and other sea perils. In the event of an ultimate decree of mutual fault, it was asserted that the damages should be equally divided with a provision treating all cargo loss paid by the carrier as a loss sustained by it for its own account as a result of the collision (R. 96-101).

The owner of the "King" also answered the intervening petition asserting that trial had been had, mutual fault found with a direction of a division of damage, and asking that its rights be preserved accordingly (R. 101-104).

A stipulation of facts with attached documentary exhibits was entered into by all parties for the purpose of permitting the Court to pass upon the legal rights of intervening underwriters with respect to the form of the interlocutory decree to be entered (R. 49-56). The issues presented upon the pleadings and stipulations

were then presented to the Court for determination upon settlement of the interlocutory decree.

The position urged by intervening underwriters was that their policies insured cargo; that the payments made thereunder were for cargo's benefit; that enforcement of the rights of cargo acquired by subrogation was sought, and that, therefore, the "King" being at fault, they were entitled to a decree for full damage against that vessel leaving it to obtain the recoupment allowed by law against the "Dixon". This position was based upon the authority of the following decisions of this Court:

The New York, 175 U. S. 187, 209, 210;
The Chattahoochee, 173 U. S. 540, 554, 555;
Erie R. R. Co., v. Erie & W. Transp. Co., 204 U. S. 220, 226.

Decision of the Insurance Question.

The District Court wrote an opinion (R. 104-105) the effect of which was to sustain the underwriters' claim to enforcement of subrogation. It was held, because trial had been had and mutual fault found, "the underwriters are entitled to enforce the liability of the "King" and the "Dixon" each for a moiety of the cargo losses" (R. 105). The Court mistakenly, as it subsequently appeared, directed entry of the decree presented on behalf of the carrier.

On the following day, the Court discovered this error and advised counsel in a letter in which it was stated that the opinion should have expressed the view that the "insurance was paid for by and was primarily for

the benefit of cargo owners'' (R. 106). It was directed that a further decree in conformity with the opinion be submitted.

After considering further argument, the Court wrote a supplemental opinion (R. 107-108). As we read it, the Court determined:

1. That the cargo owners are the real beneficiaries of the insurance.
2. That the petitioner assumed to the shippers an obligation to provide marine insurance on their cargo.
3. That the petitioner also assumed the common law obligation of a carrier to carry safely.
4. That the policies recognize and cover both differing liabilities of the carrier.
5. That shippers were entitled to have the protection of marine insurance as well as of the carrier's common law liability.
6. That when the loss occurred, the rights of all the parties became fixed and were not affected by the payment by the carrier of the losses out of its own funds on the theory that it could thus deal with the liability as one for loss of cargo and deny the underwriters' right of subrogation.

Decree in accord with the Court's direction was entered (R. 108-113).

Petitioner appealed to the Sixth Circuit Court of Appeals, assigning error both with respect to the finding of mutual fault and also with respect to the determination respecting insurance. The Circuit Court of Appeals affirmed the decree of the District Court as to both parts of the appeal (R. 123-134).

The opinion of the Circuit Court of Appeals upon the insurance point first held that the wording of the eleven tariffs under which the "Dixon's" cargo was carried were each so worded as to waive the provisions of the Harter Act (R. 131). The Court reviewed the applicable language of the tariff schedules, and determined from these terms and conditions for the carriage of cargo, that the owners of cargo would naturally conclude that their property was to be covered by marine insurance. It was then held:

> "and we think the policies in suit were procured by appellant in compliance with its contracts and were issued primarily for the benefit of cargo owners" (R. 132).

The Court then considered various provisions of the policies of insurance which it deemed to be indicative of an intent to procure coverage upon cargo and reached this conclusion:

> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went on further than to require it to procure policies of insurance from others. We think the parties could not have failed to understand that these policies were issued primarily for the benefit of cargo and that the payments made and to be made by the underwriters were in settlement of their liability to cargo owners" (R. 133).

It was accordingly determined that by reason of the affirmed finding of mutual fault, there was no error in decreeing a recovery against each vessel of a moiety of the payments made, and to be made, by the underwriters on account of loss to cargo, with the provision for payment by one of any balance uncollectible from the

other (R. 133). The decree below was affirmed (R. 134).

Petitioner sought rehearing (R. 134-142) which was denied (R. 142).

Thereupon ensued application for certiorari.

Basis of the Decree Below.

By its specifications, in support of petition for writ of certiorari, petitioner asserts error upon the part of the Circuit Court of Appeals in affirming the interlocutory decree entered in the District Court. It is thought requisite, therefore, to point out the basis of the decree below.

The libel filed by petitioner, as owner of the "Dixon" and as carrier and/or bailee of cargo, alleged collision with the "Dixon" by the "King" by reason of the asserted sole fault and negligence upon the part of the "King"; and that the ensuing damage, both to the "Dixon" and her cargo, was solely the result of the fault and negligence of the "King" against which a lien was claimed (R. 10-15).

By their intervening petition, in addition to the allegations respecting the carrier's agreement to provide insurance and the issuance by underwriters of policies of insurance "for account of whom it may concern" insuring the "Dixon's" cargo, underwriters alleged the filing of the libel by the owners of the "Dixon" against the "King"; that sole fault upon the part of the "King" was therein charged and restated

the particular faults asserted (R. 43-44). In addition to their claim of subrogation to rights of cargo owners and shippers through payment of cargo loss and damage, it was further alleged that the collision was due to the fault and negligence of the "King" and her owner in the respects stated in the libel (R. 45).

It is thus apparent that the cause of action, asserted first by petitioner in behalf of cargo and subsequently by intervening underwriters claiming subrogation to cargo rights, is solely based upon the fault and negligence of the "King" in causing the collision and ensuing damage. There is no suggestion in the record of a claim on behalf of cargo that the "Dixon", or its owner, was liable to cargo because of a breach of the carrier's contract of carriage. The only party claiming fault upon the part of the "Dixon" was the owner of the "King", and its plea was based upon negligence. It must be understood, therefore, that the cause proceeded in behalf of cargo as one for negligently causing the damage sustained.

Both the "King" and "Dixon" were found at fault upon the trial, and division of damage was accordingly directed (R. 31-40). That decision of the District Court, by reason of affirmance by the Circuit Court of Appeals and subsequent denial of certiorari with respect thereto by this Court, is final and constitutes the law of the case.

The right of cargo to recover was thereby determined. It was determined upon the pleadings and issues then before the Court. The determination was not and could not be that the "Dixon" was liable

for breach of contract—that was not in the case in either pleadings or proofs. The determination was that cargo could recover because of the negligent operation of both vessels. Then these underwriters intervened to stand in cargo's place as subrogees—to collect what was collectible on cargo's behalf by reason of the Court's determination already made. The only question which then arose, indeed, the only question which could then arise, was whether they had acquired, by subrogation, the rights of cargo; whether they had the right as cargo's subrogees to receive the benefits flowing to cargo by reason of the determination that cargo could recover its damages because both vessels were negligent.

In reaching its decision upon that question, the District Court concluded that petitioner agreed with cargo owners and shippers (1) to provide insurance against marine perils, and (2) to assume the liability of a common carrier as at common law; that the insurance procured from intervening underwriters insured both cargo and petitioner's liability with respect to cargo; that cargo paid the insurance premiums under the rates charged, and that the insurance was primarily for its benefit; and that, upon payment of the loss and damage sustained by cargo, intervening underwriters became subrogated to all the rights of cargo, which right of subrogation could not be defeated by the carrier's act of payment of losses since the rights of the parties became fixed by reason of the occurrence of the collision (R. 104-108). This had nothing to do with the right of cargo to recover—that had already been determined. It related only to the right of underwriters to stand in cargo's place.

The Circuit Court of Appeals in considering the appeal as to this point expressed the view that under the tariff provisions petitioner had waived the saving provisions of the Harter Act; and in affirming the decree further held that, in compliance with the terms of the contract of carriage, petitioner procured the policies of insurance primarily for the benefit of cargo owners, and hence that the payments made in settlement of insurer's liability to cargo owners were properly recoverable through subrogation (R. 123, 130-134).

The ultimate contention of petitioner is that intervening underwriters may not enforce the rights which they obtained from cargo owners so as to require petitioner to pay a liability with respect to cargo, for as to such liability petitioner urges that it was itself insured by the same underwriters under the same policies and had itself paid the losses.

Based upon the consideration pointed out, it does not follow from the decree that the rights of cargo acquired by intervening underwriters are enforced against petitioner as a direct liability to cargo or that petitioner has been found liable by reason of its relation with cargo.

Rather is the decree supported upon the following principles: That two vessels colliding as the result of mutual fault are joint *tort feasors;* that as between themselves each vessel is required to bear one-half of all loss and damage resulting from the collision as to which *either* of them is legally liable; and that with all parties before the Court the amount of damage is equally apportioned and recovery decreed accordingly

against each vessel; that with but one of the offending vessels before the Court the apportionment for mutual fault cannot then be made but is apportioned in further proceedings for contribution from the remaining offending vessel. Having held that the policies were primarily for the benefit of cargo and that full recovery should be had by underwriters through subrogation, the Court in applying these principles, determined that since both vessels, each of which had been condemned in fault, were before the Court, it was proper to determine the ultimate responsibility and to apportion the cargo damage by awarding a decree for a moiety as against each vessel; thus enforcing ultimate liabilities in avoidance of circuity.

It is submitted that the "Dixon" has been decreed to pay, *not a liability in respect to cargo,* but in effect, a liability to the "King" arising out of collision under the established doctrine requiring both vessels mutually at fault to each pay one-half of all resulting loss or damage for which *either* of them is legally liable. It follows that petitioner in responding to the decree, will not pay a liability against which it was insured under the policies.

The Wyman, Partridge Rate Case.

In the Statement of Facts contained in its Brief, petitioner quotes copious excerpts from the opinions of the Interstate Commerce Commission in the case of *Wyman, Partridge & Co., et al. v. Boston & Maine R. R., et al.,* (1908) 13 I. C. C. 258; (1909) 15 I. C. C. 577. Based upon these excerpts petitioner thereafter urges the controlling effect of the decisions in that case upon

the instant cause. Subsequently at pages 38-40 of its Brief, petitioner cites the decision in the case of *The Grecian*, 78 F. (2d) 657, (C. C. A. 2); certiorari denied by this Court (299 U. S. Advance Sheets 1 p. XXVI). In the latter case, the facts were considerably variant from those at bar in that no policies of insurance were under consideration as to application of their insuring clauses; and the decision rested upon the construction accorded the bill of lading and tariff provisions there employed. Nevertheless, it appears that in the case of *The Grecian, supra*, the appellant strongly urged the *Wyman, Partridge* decisions as a controlling authority upon the similar contention made in the instant cause by petitioner. The Circuit Court of Appeals for the Second Circuit considered the decisions at length and rejected them for a number of expressed reasons. Since the language of the tariffs there employed was similar in content to that appearing in Schedules C-6 and C-9 here applicable and concurred in by petitioner (R. 81, 83-84) the reasons which impelled the appellate court in that case to reject the Commerce Commission's decisions are effective here, and nullify the effect claimed therefor by petitioner. The record here is devoid of any facts with respect to the fixing of rates which could be made applicable to the cited decisions; and certainly unwarranted assumptions may not be indulged in to arrive at such desired result.

Further, it is submitted that the *Wyman, Partridge* decisions arose out of attack before the Commerce Commission by shippers upon the lawfulness of increased rates for rail and lake transportation sought to be established by rail carriers. The proceeding was essentially one with respect to increased rates, and had

no direct relation to the insuring provisions under consideration here. Moreover, there is here no showing of connection or relation of those decisions to the present Uniform Bill of Lading which, as shown by the record, was adopted March 15, 1922, a number of years subsequent. It is submitted that the *Wyman, Partridge* decisions do not have the force or effect claimed for them by petitioner.

ARGUMENT.

POINT I.

The decisions of the courts below that the policies were issued primarily for the benefit of cargo and that underwriters through payment, are subrogated to the rights of cargo are correct.

The policies must be construed in the light of the contractual relations existing between carrier and cargo owner evidenced by the various tariffs and bills of lading under which shipments were made.

Petitioner contends that under the provisions of the contracts of carriage it assumed liability to cargo owners and shippers for all loss and damage due to perils of the sea, and that the policies of insurance were issued, not for the benefit of cargo owners, but to indemnify it against the liability so assumed.

It is both pertinent and requisite, therefore, that examination of the tariff provisions be made in order to determine who were the parties covered by the insurance policies issued "for account of whom it may concern".

A.

The tariffs obligated the carrier to provide marine insurance for cargo in return for the rate charged.

The eleven applicable tariffs (R. 77-86) are not uniform in form and content. The decision of the Circuit Court of Appeals grouped them into three classes (R. 131). For purposes of examination of the applicable provisions, that grouping is here adopted.

So classified, the first class consists of the two tariffs issued by the petitioner itself (Schedule C-1, C-2, R. 77, 78). Schedule C-1 contains the Title Page and applicable rule; Schedule C-2 contains the rule alone. The title page of Schedule C-1 contains the statement "Rates named herein include marine insurance". The effective language typical of both schedules is quoted in the decision of the Circuit Court of Appeals (R. 131).

Analyzing the language employed in this class of tariffs, it is apparent, both from title page and rule content, that the carrier held out to the shipper a positive representation that it would provide marine insurance in return for the rates charged for the transportation. The cost of procuring the marine insurance was included in the tariff rates named, and was accordingly paid by the shipper or cargo owner as a part of the transportation cost. The tariffs also provide that while shipments were carried under rates named as including marine insurance, the Transit Corporation assumed liability for loss or damage thereto caused by marine perils. This wording was determined by the Circuit Court of Appeals to constitute a waiver of the

Harter Act (Act of February 13, 1893, c. 105, 46 U. S. C. A. 190-195).

The second class of tariffs was divided by the Court into two groups. The first group includes the provisions of four tariffs (Schedules C-3, C-7, C-10 and C-11, R. 79, 82, 84-86). Each of these tariffs is a joint lake and rail tariff wherein the Transit Corporation participates in a through rate with a delivering rail carrier. Schedule C-3 (R. 79) contains the heading "Governing Marine Insurance on Rail and Lake Traffic". The other three noted tariffs each contain the heading "Marine Insurance". In each of these tariffs there is contained the statement that the lake carrier and rail carrier jointly and severally assume liability for loss or damage caused by marine perils while the goods are water borne on petitioner's vessels. It is evident that under these tariffs the cargo shipper could proceed against the initial rail carrier as provided by law; and that the tariff provisions have no application until delivery is made to the lake carrier.

In the second group, consisting of Schedules C-4, C-5 and C-8 (R. 79, 80, 82-83), the tariffs apply to various named canal and lake lines, including petitioner. Each tariff again contains the heading "Marine Insurance." In Schedule C-4, the assumption of liability provision is limited to each carrier therein named "as its interest may appear"; while in the remaining two schedules, the assumption provision applies in terms only while water borne shipments are transported on petitioner's vessels.

The third class designated by the Circuit Court of Appeals consists of Schedules C-6 and C-9 (R. 81, 83-

84). The provisions of these tariffs wholly differ from those of either the first or second class. They are applicable to various lake carriers, including petitioner. The pertinent provisions of these schedules are quoted in the opinion of the Circuit Court of Appeals (R. 131). These tariffs are explicit that the water carrier represents that the rates include marine insurance against perils of the sea. The reference to liability of the carrier plainly means the liability to procure marine insurance in return for the rates charged.

Examination of all the tariffs shows that there is contained in each some definite reference to "Marine Insurance." In two of the three groups designated by the Circuit Court of Appeals, including the first group issued by petitioner itself, there is found the express statement that the "rates named include marine insurance." In the second group, the reference is found in the heading of the tariff provisions reading "Marine Insurance."

The Circuit Court of Appeals found that:

> "These were the terms and conditions upon which appellant agreed to carry cargo and the owners would naturally conclude that their property was to be covered by policies of marine insurance" (R. 131-132).

In view of the universal custom of shippers by water to personally procure insurance or require the carrier to do so for their benefit, it is difficult to see how the Court below could have arrived at a different conclusion.

It is the contention of intervening underwriters that only a single reasonable meaning is to be ascribed to

the language respecting marine insurance. The language and phrasing constitutes an agreement upon the part of the water carrier with cargo owners and shippers, in return for the tariff rate charged for the transportation, that the carrier will procure marine insurance for the benefit of cargo against loss while water borne. The obligation imports a resort by the carrier to authorized marine underwriters for the issuance of marine insurance. To state it otherwise, the water carrier, by reason of the applicable tariff provisions, was obligated to take out policies *on cargo, for cargo, and without* further *cost to cargo;* and accordingly, the insurance obtained in furtherance of that obligation was cargo insurance quite as though cargo had itself procured the insurance. The words "Marine Insurance" wherever used import the issuance of a legal policy. The petitioner has no such power.

The Federal Court decisions cited by petitioner in support of its contention have been construed to impose upon the carrier the duty to place insurance upon the goods through the agency of underwriters, and to deliver the goods safely, or in case of loss, to deliver the insurance money collected by it as the equivalent of the loss.

In the case of *Gross v. New York & T. S. S. Co.,* (D. C.) 107 Fed. 516, it was held by Judge Addison Brown that an agreement by the carrier that a rate "would carry insurance" imposed on the carrier the duty to place insurance upon the goods and to collect it for the shipper in the event of loss. See also *Virginia-Carolina Chemical Co. v. Chesapeake Lighterage & Towing Co.,* (C. C. A. 2), 279 Fed. 684, 686.

In the case of *Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co.*, (D. C.) 179 Fed. 133, the carrier offered two rates; the higher being an "insured rate" which was paid by the shipper. The Court accepted the construction of the Gross case, *supra*, that the more natural interpretation of the obligation was an undertaking to procure insurance elsewhere, to collect it and pay the proceeds to the shipper.

The express inclusion of the cost of marine insurance as a part of the tariff rate is further persuasive evidence of the intent of the carrier to provide insurance protection for the benefit of cargo. If cargo owners and shippers pay rates which include the cost of marine insurance, surely they are entitled to the benefit of the protection of that insurance. Otherwise the expressions concerning marine insurance are devoid of meaning. The fact is unassailable that petitioner has fixed tariff rates under which it has been recompensed for the cost of procuring insurance through collection of freight moneys.

Giving effect to the determination of the Circuit Court of Appeals that the tariff schedules were so worded as to waive the Harter Act (R. 131), no valid reason exists why the tariffs should contain any reference to marine insurance unless the intendment of the carrier was to provide marine insurance for cargo.

Doubtless, the existence of the obligation furnishes the motivating reason for the issuance of the policies "for account of whom it may concern." For if the tariffs are to be construed merely as urged by petitioner, there exists no reason for the inclusion of the

"for whom it may concern" clause. The clause is meaningless unless it be construed to mean that insurance effected by and in the name of the carrier is to extend to all to whom it has represented insurance would be procured. If the tariffs were only intended to provide an assumption of liability, the policies presumably would have read "for account of itself," thereby identifying, beyond peradventure, the carrier, as the assured to whom the loss was payable.

Willamette Nav. Co. v. Hartford Fire Ins. Co., 287 Fed. 464, 466, 467 (C. C. A. 9).

B.

The policies were issued for the primary benefit of cargo.

In the opening paragraph of the policy rider form, the petitioner is named as the nominal assured, followed by the significant phrase "for account of whom it may concern." The breadth and scope of meaning of the phrase has been adjudicated by this Court.

Buck v. Chesapeake Ins. Co., 1 Pet. 151;
Hooper v. Robinson, 98 U. S. 528;
Hagan v. Scottish Union & Nat'l Ins. Co., 186 U. S. 423.

In the latter case, after quoting with approval from the statement contained in 2 Duer, Marine Insurance, page 28, with respect to the insuring clause as employed in English policies and also in this country, this Court said at page 431:

> "The English form insures the person to whom the property insured 'doth, may or shall appertain,' thus insuring the owner or one who has an interest in the property at the time when the loss

> occurs. And the author says the words 'on account of whom it may concern' have the same significance as the language used in the English form."

Further, at page 433, this Court said:

> "The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, *and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied.*" (Italics ours.)

To the same effect, see:

Symmers v. Carroll, 207 N. Y. 632;
Duncan v. China Mut. Ins. Co., 129 N. Y. 237.

In the case of *Symmers v. Carroll, supra*, the Court said at page 638:

> "It is sufficient if he intended to insure their interests in the cargo for their benefit and such intention is established by the words in the policy 'for account of whom it may concern.'"

The phrase "for whom it may concern" definitely imports the construction that the insurer is thereby advised of the fact that interests other than those procuring the insurance are thereby intended to be covered, and that others will be interested at the time of the occurrence of a loss. So construed in accordance with the authorities, the inclusion of the phrase "for whom it may concern" completely complements the

obligation of the tariff to furnish marine insurance, and shows that the cargo owners and shippers forwarding goods under the tariffs in question were necessarily within the contemplation of the carrier when it procured the policies of insurance. On the one hand, it had assumed the obligation to provide such insurance in exchange for payment of the rates named; while, on the other, it procured insurance for the benefit of those who paid the premium. In such case, the carrier is but a conduit through which flows payment of the obligation to make good the loss sustained. To contend otherwise is to destroy the established meaning of the "for whom it may concern" clause, and to urge a construction without reference to its fixed import.

Further, as bearing upon the holding that the policies cover cargo primarily, it is significant with respect to the policy form that the loss payable clause reads:

> "Loss, if any, payable to Great Lakes Transit Corporation, or order" (R. 63).

The incorporation in this clause of the phrase "or order" renders this form similar to that commonly used in open policies of marine insurance where certificates of insurance are issued thereunder. Thus there is provided a simple method of payment of loss by endorsement to any holder of outstanding documents. If it were not here so intended, again no reason exists for the addition of these words.

In addition, in the ensuing paragraph is found the phrase "It is agreed to hold covered * * * any cargo

per vessels sailing" (R. 63). This language is consistent only when the policies are construed as covering cargo.

Referring to the coverage clause found in the subsequent paragraph reading "and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases" (R. 63), it is submitted that, fairly construed, this clause must be read to mean that the coverage constituted insurance for others included within the "for account of whom it may concern" clause in fulfillment of the obligation to provide such insurance under the contracts of carriage. Both the lower courts correctly treated the clause as indicating an intent to thereby protect the cargo owner and shipper (R. 107, 133).

In the latter part of the same paragraph is found this expression: "Also to cover through to destination goods delivered by the Assured to other water transportation companies for shipment to destination" (R. 64). The Circuit Court of Appeals failed to comment thereon in its review of policy provisions. However, the clause seems to plainly point to a single meaning: that of coverage of cargo after leaving the possession of the Transit Corporation. If this be true, must not cargo necessarily be the subject of policy coverage while the goods are still in the carrier's possession?

Reliance placed by the petitioner upon the clause reading "The Assured taking upon themselves as to

said cargo or parts thereof * * * the insurance of said cargo against perils of the seas and lakes" etc., was properly rejected by the Circuit Court of Appeals for the reason (R. 133):

> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went no further than to require it to procure policies of insurance from others."

It is submitted that this holding is in accord with the adjudicated cases and results from the natural interpretation of the obligation.

In the paragraph printed at top of page 65, there appears this language: "and for any and all claims which said cargo may be called upon to contribute in general average." In view of the determination that petitioner had waived the Harter Act, the liability of the petitioner must be that liability existing for water carriers prior to the adoption of that statute. But "a carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer and even greater but its nature is not the same." *Hall v. Nashville & Chattanooga R. R. Co.*, 13 Wall. 367; *The Niagara v. Cordes*, 21 How. 7. Apart from the Harter Act, the owner of the ship is not entitled to general average contributions where the loss is sustained through negligence or fault of those for whom he is responsible. *The Irrawaddy*, 171 U. S. 187. The policy provision with respect to indemnity for claims for General Average contributions speaks only with reference to cargo and not with respect to the petitioner's assumption of liability.

Mention was made by the Circuit Court of Appeals of the standard form of "sue and labor" clause contained in the policy (R. 66). It is submitted that it is possible under the authority granted by this clause, to defend, safeguard or recover insured *property only*. Clearly the clause would be mere surplusage if the liability of the carrier was alone insured.

A further reason supports the contention. There exists a clear distinction between a promise to personally indemnify another and a promise to take out and collect insurance for him. An important consequence of the distinction appears in case the promisor becomes insolvent before the loss occurs. In the first case, the insured would have merely a general claim against the insolvent owners and could not pursue their underwriters for he is not in privity with reinsurers. Such reinsurance would benefit only the reinsured as indemnity against loss under the settled principle that the proceeds are assets distributable generally, against which the insured has no special equitable claim.

U. S. v. Federal Surety Co., 72 F. (2d) 964, 967, and cases cited (C. C. A. 4); cert. denied 294 U. S. 711.

Such a dismal and barren result could scarcely be within the contemplation of cargo owners and shippers. On the contrary in the second case, in the event of insolvency of the carrier, cargo owners and shippers may recover the amount of their loss directly from the insurers and are not relegated to a general claim against the carrier.

Young v. St. Paul Fire & Marine Ins. Co., 204 App. Div. 807, (1st Dept.) aff'd. no opinion, 236 N. Y. 665.

The conclusion of the Circuit Court of Appeals was manifestly correct in deciding (R. 133);

> "We think the parties could not have failed to understand that these policies were issued primarily for the benefit of cargo and that the payments made and to be made by the underwriters were in settlement of their liability to cargo owners".

C.

Underwriters are entitled by subrogation to all the rights of cargo owners.

It is settled law that marine underwriters, by payment of a loss, become by operation of law and without assignment subrogated to all the rights of the insured in regard to that loss.

The Potomac, 105 U. S. 630, 634;
Liverpool, etc., S. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 462;
Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed. 648, 651 (C. C. A. 6); cert. denied 229 U. S. 620.

And it is equally well settled that the underwriters were entitled to intervene herein to enforce the right so acquired by subrogation.

The Atlas, 93 U. S. 302, 316;
The New York, 175 U. S. 187, 209;
Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., supra.

Petitioner concedes at page 22 of its Brief that unpaid cargo owners "had an action directly" against the "King" and her owner when petitioner began suit.

That those cargo owners possessed such a cause of action against the non-carrying vessel is clearly the case as shown by our argument. That cause of action directly against the "King" arose out of the occurrence of the collision and was common to all cargo owners and shippers whose shipments thereby suffered damage. The right plainly ensued from the wrong doing and was susceptible of enforcement by *all damaged* cargo owners and shippers. Being thus fixed by the occurrence of the loss, the remedy for the enforcement of the right could not thereafter be abrogated, nullified or destroyed by the act of petitioner through the making of payments out of its own funds, and in thus seeking to deal with the liability as one for cargo loss and so prevent operation of the underwriters' right of subrogation. The rejection by the District Court of petitioner's contention based on this act of payment (R. 108) was clearly correct and is completely justified by the statement in petitioner's brief.

POINT II.

Assuming that the Transit Corporation was also an insured under the policies, the decree below is correct and intervening underwriters are entitled to subrogation.

That petitioner, as a carrier, possessed an insurable interest in the shipments entrusted to its care may not be doubted. Such interest is similar to that of warehousemen, factors and other bailees and trustees of goods entrusted to their care. The excerpt quoted at page 21 of Petitioner's Brief from the opinion of this Court in the case of *Hooper v. Robinson, supra,* clearly

demonstrates the distinction existing between insurance covering a carrier "to the extent of his own interest in that to which such interest relates", and insurance operating through the clause "on account of whom it may concern" for all others to the extent of their respective interests.

Applied to the policies under consideration, it would seem to follow that although the petitioner, who had assumed the liability of a common carrier, was the nominal assured named in the policy and was included within the policy coverage as to the liability so assumed; nevertheless that the policy coverage operating through the clause "for account of whom it may concern", both by intendment and expression, is to be construed as extending to and covering all those possessing an insurable interest in the goods damaged at the time of loss. So construed, the results of the distinction are readily apparent and unmistakable.

The essential fact, wholly disregarded by petitioner, is that the cause of action here sought to be enforced does not proceed upon a claim of breach of the contract of carriage. The action is not sought to be maintained against petitioner. No claim is made against petitioner on behalf of cargo by pleading or otherwise. The record is barren of any suggestion by cargo or anyone that the "Dixon" or her owner was liable for the sustained loss and damage because of any breach of the contract of carriage.

On the contrary, the cause of action sought to be enforced plainly proceeds in negligence. Satisfaction is sought of cargo's remedy arising from the collision di-

rectly against the "King" and her owner "in a cause of collision". Fault and negligence upon the part of the "King" in causing the collision and resultant cargo damage is the gravamen of the cause of action asserted on behalf of cargo by the petitioner's libel "as carrier and/or bailee of cargo" (R. 10-13). Additional emphasis to this allegation is lent by reiteration thereof appearing in the intervening petition of underwriters (R. 42-46). Similar contention was urged in cargo's behalf with respect to the form of the decree under consideration (R. 104-105) and has been since adhered to.

If the case be regarded as one wherein cargo owners and shippers were the actual libelants in their own right, can there be any doubt of the right of cargo owners to enforce their remedy and maintain their cause of action as against the "King" for negligence and to recover their full damage therefor? Obviously not, for it is the settled principle stated by this Court that innocent cargo owners and shippers are entitled to full compensation for the damage sustained by their shipments; and under a mutual fault decision, may recover their entire damage from the non-carrying vessel, leaving it in turn to recoup one-half the amount from the carrying vessel.

The Atlas, 93 U. S. 302;
Aktieselskabet Cuzco v. The Sucarseco, 294 U. S. 394.

The right of cargo to recover for negligence which caused the collision was established prior to the intervention of these underwriters. Upon intervention the underwriters did not, and could not, assert any other

or different liability or cause of action. They merely stepped into cargo's place to receive the recompense which the Court had already determined cargo was entitled to. If cargo owners and shippers were insured to the extent of their interest, as heretofore demonstrated, it follows that the question with respect to subrogation must be affirmatively answered. For upon payment of cargo loss and damage, intervening underwriters became the cargo owners and shippers for the purpose of enforcing the cause of action already maintained in behalf of cargo, viz., that for negligence resulting in the destruction and loss to cargo.

It being thus evident that the cause of action here proceeded upon is based upon negligence, and not at all upon claim of breach of contract of carriage by the carrying vessel, petitioner's argument that subrogation of intervening underwriters to the rights of cargo would not result even though the policies be considered as being for the benefit of cargo owners, is beside the point.

The case of *Wager v. The Providence Insurance Co., et al.*, 150 U. S. 99, relied upon by petitioner, fails to establish the contention. That was an action brought by underwriters claiming subrogation through payment, against Morse & Co., and Wager as carriers. Both respondents signed the bill of lading issued to cargo owners. Wager was the actual carrier of the goods transported upon his vessels. Morse & Co., possessed an open policy of insurance reading "for account of whom it may concern"; and prior to shipment procured issuance of a certificate thereunder to themselves as the insured, and paid the premium therefor. Cargo

damage and loss ensued through negligent management of the carrying vessels. The insurers thereupon paid the loss.

The decision referred to was the final determination in a prolonged litigation. Reference is made thereto for proper understanding. Following the loss and payment, the insurers, claiming subrogation, instituted action *in rem* against the carrying vessels. The case proceeded for negligent navigation and management resulting in the destruction of the cargo, to which libelants had become equitably entitled through payment. A decree for full recovery by libelants was ordered by reason of the determined negligence. *The Sydney*, 27 Fed. 119.

Appeal from that decree was dismissed by this Court for want of jurisdiction. *The Sydney*, 139 U. S. 331.

As was subsequently noted by this Court (150 U. S. 99, 111) that decree in favor of subrogated underwriters based upon the determined liability because of negligence of the carrying vessels and of Wager, their claimant, remained unreversed and in full force.

Seemingly because insufficient moneys to satisfy that decree were realized through condemnation and sale of the carrying vessels under the direction of such decree, a second action was brought by underwriters against Morse & Co., and Wager as carriers. The proceedings in that action resulted ultimately in the determination of this Court first referred to (150 U. S. 99).

All that was held with respect to Morse & Co., by the decision relied upon, was that the underwriters could not recover back from Morse & Co., the moneys

paid since Morse & Co., were the insured named in the certificate issued covering the cargo shipment; and because they were without obligation to transfer the policy to cargo owners or make it payable to them in case of loss. Affirmance of the decreed dismissal of the libel as against Morse & Co., was accordingly directed. That decision plainly turned upon the fact that Morse & Co., was "actually and in terms the party insured" because the certificate, issued at its behest and upon its payment of premium, named it as the assured and did not name any other interest therein. Furthermore, the liability sought to be enforced against Morse & Co., was not a liability for negligence, but was a liability for breach of contract of carriage which liability was expressly covered by the policy. Thus understood, the decision fails to lend support to petitioner for the reasons hereinbefore discussed.

It remains to be suggested with respect to the action as against co-respondent Wager, who was the actual carrier, that the decision of this Court further affirmed the decree obtained below by subrogated underwriters against Wager *in personam*. This affirmance rested upon the ground that the Court below properly decided that Wager was concluded by the decree rendered in the former case; and that accordingly further decree in favor of underwriters against Wager was proper. It thus clearly appears from the decision with respect to Wager that the underwriters, standing in the right of cargo owners through payment, could enforce to full recompense all the remedies cargo possessed against the carrying vessels and against their owner who had contracted for the carriage, because of negligence creating the loss. The distinction is both obvious and controlling.

POINT III.

The liability for a moiety decreed against petitioner and its steamer "George D. Dixon" is not a liability with respect to cargo, but is a liability arising out of the relation of the two colliding vessels to each other.

In the instant cause, neither in the decision of the District Court, nor in the opinion of the Circuit Court of Appeals, has it been held that the rights of cargo acquired by intervening underwriters through payment are enforced against petitioner by reason of breach of contract, or that petitioner has been held liable as a carrier of cargo.

Rather, the decree under consideration is based upon the following principles: That two vessels colliding as the result of mutual fault are joint *tort feasors;* that, as between themselves, each vessel is required to bear one-half of all loss or damage arising from the collision as to which *either* of them is legally liable and that with all parties in Court the amount of damage is equally apportioned and recovery decreed of one-half the amount of such loss and damage against each vessel; that with but one offending vessel before the Court the apportionment for mutual fault cannot then be made, but is apportioned in further proceedings for contribution from the remaining offending vessel.

As before pointed out, in cases of collision due to mutual fault, innocent cargo may proceed alone against the non-carrying vessel and recover from her *in solido* the entire amount of cargo damage.

The Atlas, supra;
The New York, 175 U. S. 187, 209, 210;
Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 418.

If, in such cases of mutual fault, both parties liable are before the Court, recovery is directed against each for a moiety of the loss and damage sustained by innocent cargo, with an alternative right of recovery from either of any balance uncollectible from the other.

The Alabama and The Gamecock, 92 U. S. 695;
The Virginia-Ehrman, 97 U. S. 309;
The City of Hartford, 97 U. S. 323.

Recovery in full by cargo in cases of mutual fault under the doctrine of *The Atlas, supra,* is decreed against the non-carrying vessel even though the carrying vessel be freed from liability to cargo by reason of the application of the Harter Act.

Aktieselskabet Cuzco v. The Suearseco, supra.

For, on a division of the entire damages between the two vessels, the non-carrying vessel may recoup one-half of the amount paid to cargo.

The Chattahoochee, 173 U. S. 540.

In that case, where mutual fault was decreed in the lower courts and affirmed by this Court, the argument against the asserted right of recoupment of one-half the cargo damage from the carrying vessel was based upon the claim that such result violated the exempting provisions of the Harter Act with respect to the carrying vessel. In overruling this claim, this Court held at page 555 that "the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both vessels be laden with a cargo". The decree below was accordingly affirmed.

Similar contentions, made with respect to the effect of the Harter Act upon the question of distribution of

damages in a case of collision arising from mutual fault, were likewise overruled by the Sixth Circuit Court of Appeals; certiorari being thereafter denied by this Court.

The George W. Roby, 111 Fed. 601, (C. C. A. 6); cert. denied, 183 U. S. 699; 184 U. S. 698.

In that case, the Circuit Court of Appeals said at page 621:

> "In other words, the right of recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other".

The direct liability of the non-carrying vessel for all the damage to cargo is "one of the consequences plainly to be foreseen", and the responsibility of the carrying vessel to the non-carrying vessel is measured accordingly.

Erie R. R. Co. v. Erie & Western Transp. Co., 204 U. S. 220, 226.

In that case, the owner of the non-carrying vessel was decreed recovery against the owner of the carrying vessel in a suit for contribution of one-half the amount of cargo damage paid by the non-carrying vessel under the prior decree holding both at fault. This Court said at page 226:

> "And it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. The right to the division of the latter element does not stand on subrogation, but arises directly from the tort. The

> liability of the New York, under our practice, for all the damage to cargo, was one of the consequences plainly to be foreseen, and, since the Conemaugh was answerable to the New York as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the New York could be held".

Applying these established principles to the instant case, it appears that by virtue of their right of subrogation intervening underwriters were entitled to recover full cargo damage; that since the "King" had seized upon the procedure authorized by the 56th Admiralty Rule and had impleaded the owner of the "Dixon" as being at fault with respect to cargo damage, and the Court had determined each vessel mutually, at fault as the result of the trial, the ultimate result of the fixation of the rights of the parties was to be decreed, and the damage to cargo accordingly apportioned between the offending vessels by awarding a decree for a moiety against each.

Here, petitioner, in its representative capacity for the benefit of cargo, sued the "King" as alone at fault. The "King" then pleaded against the owner of the "Dixon" with respect thereto under the 56th Admiralty Rule. At trial, the case stood with both parties before the Court but with no issue of pleading as between cargo and the "Dixon", for cargo failed either to adopt the "King's" allegations of fault against the "Dixon" or to itself affirmatively assert fault against the "Dixon". Cargo thus exercised its right not to proceed against the "Dixon".

Jensen v. Bank Line, Ltd., 26 F. (2d) 173, 175 (C. C. A. 9).

Though the "King" was thus liable to cargo for its full damage, since the owners of the "Dixon" were also before the Court through effective pleading of the "King" and mutual fault was found, the "King" was entitled to contribution from the "Dixon" for a moiety of the damage for which the "King" was liable. The Court thereupon decreed the ultimate and directed a direct payment by each guilty vessel of a moiety under circumstances which would have otherwise required the "Dixon" to pay a like amount to the "King."

In such cases where all parties are before the Court the decree, in avoidance of circuity, may fix the ultimate liabilities and require each vessel to pay a moiety.

The Cockatoo, 61 F. (2d) 889 (C. C. A. 2); Cert. denied 287 U. S. 669.

In that case, the Second Circuit Court of Appeals said at page 892:

> "In reason it can make no difference whether the non-carrying vessel recoups itself out of money due from the carrying vessel as was done in The Chattahoochee or recovers the amount of contribution affirmatively as in Erie R. R. Co. v. Erie Transportation Co. In either case, the property of the non-carrying vessel is used to liquidate one-half of the claim of the cargo, and by either mode of satisfying the claim the carrying vessel is subjected (whether directly or not) to liability for one-half the damages suffered by the cargo.
>
> Nor can it make any difference whether the cargo recovers its full claim against the non-carrying vessel and she recovers half against the carrying vessel, or whether, as here, the Court decrees that the cargo recover half damages against each vessel." • • •
>
> "The liability to contribute imposed under the rule of The Chattahoochee and further extended

> by Erie R. R. Co. v. Erie Transportation Co., originates in the law of torts as applied by the maritime law, and is not affected by the terms of the Harter Act."

It follows that the claim for cargo loss and damage results directly from the tort of collision. When the joint tort feasors are each decreed to respond for a moiety of the loss and damage sustained by cargo, they necessarily do so in response to the joint and several obligations imposed on them by reason of the maritime tort.

It thus appears that the "Dixon" has been decreed to pay, *not a liability with respect to cargo*, but, in effect, a liability arising solely out of the relation of the two colliding vessels to each other. The decreed payment by the "Dixon" to cargo is merely the result of procedural convenience since such payment represents the distribution of justice among those responsible for the tort, and is made without reference to the relation of the carrying vessel to her cargo.

If the reasoning here urged upon the cited authorities is correct, then petitioner's further argument must necessarily fail for in no event is the liability here decreed against the "Dixon" one covered by the policies, but rather it is a liability to respond to another vessel in half damages for all cargo loss resulting from the mutual fault causing the collision and resultant loss.

Moreover, the argument of petitioner goes to the same end as was contended for by the respondent in resisting the claim for contribution asserted in the

case of *Erie R. R. Co. v. Erie & Western Transp. Co., supra.* In overruling the contention there made, this Court said at page 226:

> "Therefore, the contract relations between the Conemaugh and her cargo have nothing to do with the case. See The Chattahoochee, *supra.* More, specifically, the last named vessel's liability to the New York is not affected by provisions in the Conemaugh's bills of lading, giving her the benefit of insurance, and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months."

The Sixth Circuit Court of Appeals likewise disposed of the similar contention in the case of *The George W. Roby, supra,* where it was said at page 621:

> "Neither one of these stipulations has any bearing upon any question here presented. Neither cargo owners nor cargo underwriters are endeavoring to hold the Florida liable for cargo losses. The right of recoupment, which we hold to exist in favor of The Roby, by which one-half of the decree against her for cargo loss on the Florida has been set off against the decree against The Roby for one-half the value of the Florida, does not depend upon the liability of the Florida for cargo damages, but rests upon the liability of the two colliding vessels to bear equally the burden resulting from a collision due to their mutual fault. • • • The answer to the objection now under consideration is that the Florida has not been held liable to cargo owners, and, therefore, the bill of lading stipulations have not come into effect."

It results that, in avoidance of circuity, the decree below does substantial and direct justice between all the parties in keeping with the determination of mutual fault.

CONCLUSION.

The order and decree of the Circuit Court of Appeals affirming the interlocutory decree entered in the District Court with respect to the decreed recovery in favor of Atlantic Mutual Insurance Company and other similarly situated underwriters should be affirmed with costs.

Dated, March 31st, 1937.

Respectfully submitted,

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